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82-1654
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,

Petitioners

V.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The principle question presented for review is:

Whether the Court of Appeals correctly held that Jane Doe, as Plaintiff, was a "prevailing party" for purposes of attorney's fees under 42 U.S.C. §1988 in light of special circumstances presented by this case.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,

Petitioners

V.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Bailey Marshall, Director of the University Interscholastic League, and member of the Executive Committee, individually, and in his official capacity, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 6, 1983.

PARTIES TO THE PROCEEDING

In the District Court below, Jane Doe, on behalf of her minor son, John Doe, as Plaintiff, brought suit against:

Bailey Marshall, Director of the University Interscholastic League, and member of the ex-

ecutive committee, individually and in his official capacity;

William Farney, State Athletic Director of the University Interscholastic League, and member of the Executive Committee, individually and in his official capacity;

Thomas M. Hatfield, Chairperson of the University Interscholastic League Legislative Council and member of the Executive Committee, individually and in his official capacity;

Other members of the University Interscholastic League Executive Committee: Lynn F. Anderson, Lynn W. McCraw, Betty Thompson, Clifton Van Dyke, Jesse J. Villareal, and June S. Williams, each individually and in his official capacity;

Dr. Emmett McKenzie, Jr., Superintendent of Alvin Independent School District, in his official capacity.

All of the individuals serve in the capacities described except Clifton Van Dyke and June S. Williams, who no longer serve as members of the University Interscholastic League Executive Committee, and Thomas M. Hatfield who now serves as Chairperson of the Executive Committee. However, Bailey Marshall as Director of the Univeristy Interscholastic League is the real party in interest and no defect as to parties is alleged by Petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals, for which review is sought, is reported at 694 F.2d 1038. A copy of the opinion is included in the Appendix to this Petition. The District Court order is not reported but is included in the Appendix together with the District Court's judgment. The earlier opinion and judgment of the Fifth Circuit are also set out in the Appendix together with the District Court's earlier opinion (entered as "Reasons for Granting Preliminary Injunction").

JURISDICTION

The opinion of the Court of Appeals was entered on January 6, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes in question in this case are Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794; 42 U.S.C.A. §1988; and Art. VIII, Secs. 13 and 14 of the Constitution of the University Interscholastic League (UIL) for 1978-1979.

Section 504 of the Rehabilitation Act of 1973, originally provided:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(6) (29 U.S.C. §706[6]), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 was amended in 1978 to provide for nondiscrimination by federal agencies, and after amendment now reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7) (29 U.S.C. §706[7]), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

The Attorneys' Fees Act, 42 U.S.C.A. §1988, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

> modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Article VIII, Section 13 of the Constitution of the University Interscholastic League (UIL) for 1978-1979, provides as follows:

> Sec. 13. *Changing Schools*—A pupil changing schools is not eligible in League contests, until he has been in attendance at the school to which he changes for one year if: a) his parents reside outside the school district; or 2) his parents reside outside the school attendance zone in school districts with more than one high school.

Article VIII, Section 14 of said Constitution provides in relevant part (with inapplicable exceptions omitted) as follows:

> Sec. 14. *One Year Rule*—A pupil who has represented a high school (other than his present school) in either football or basketball is in-

eligible, only in the sport or sports (football or basketball) in which he participated, for one calendar year in a school to which he changes.

STATEMENT OF THE CASE

Jane Doe filed suit anonymously on behalf of her son, John Doe, an emotionally handicapped minor, against officials of the Texas University Interscholastic League in their individual and official capacities. The suit alleged that the "no transfer" rule imposed by UIL on all Texas public high school students violated 29 U.S.C. §794 (hereinafter referred to as Section 504) which prohibits discrimination against handicapped persons by those operating any program or activity receiving federal financial assistance. Jane Doe sought a preliminary injuction to allow her son to play football in the school district where he was residing with his grandmother after psychiatric evaluations and a therapist recommended he be temporarily removed from his parents' residence.

The immediate transfer of Jane Doe's son to another school district, coupled with his request to play football with that district's football team, violated the UIL's rules which required one year of residency in a school district prior to a student being eligible to participate in high school athletics. Jane Doe did not seek to invalidate the UIL "no transfer" rule or to test its constitutionality. She merely alleged the District Court had jurisdiction to grant her a private cause of action to show that the effect of the UIL rule violated Section 504 of the federal law and its implementing regulations under 45 C.F.R. 84.36, *et seq.* She alleged that Section 504 and its regulations required the UIL to make a reasonable accommodation to the needs of her "handicapped" son since he was attempting to participate in a program or activity which received federal financial assistance.

The UIL filed a motion to dismiss arguing, *inter alia*, that the DistrictCourt had no jurisdiction to hear a private individual's complaint which alleged violations of Section 504 and, alternatively, that Jane Doe had to exhaust her administrative remedies prior to bring suit. Hearing was set by the District Court to show cause why a preliminary injunction should not issue to restrain the UIL from barring John Doe from playing football (only) in the school district to which he had transferred. At the hearing, the UIL denied that it was a recipient of federal financial assistance for regulatory purposes under Section 504. It further argued that Jane Doe had not made the prerequisite showing that the UIL had received such funds. Further more, Jane Doe did not show that her minor son, because of the UIL's treatment of his case, was subjected to treatment any different from that of other individuals falling under the provisions of the UIL's "no transfer" rule. The District Court, however, granted a preliminary injunction enjoining the UIL from interfering with or preventing the minor John Doe from full participation in the football program at his new school. While the court specifically found that John Doe was a "handicapped" individual within the provisions of Section 504 and that Section 504 provided a private cause of action to him, it made no finding that the UIL was a recipient of federal financial assistance or that federal money for athletics had been directly or indirectly received by the UIL.

The UIL filed notice of appeal and costs bond in the amount of $250.00. On the same day a notice of appeal was filed, the UIL filed an application for stay pending appeal. Stay was denied by the District Court.

During the pendency of the appeal, John Doe graduated from high school after having continued to play football throughout his senior year. In supplemental briefs prior to oral argument, at oral argument, and

in post-submission memorandums, attorneys for both the UIL and Jane Doe agreed that the case on appeal was not moot. Both parties argued that a decision was needed on the substantive issues at bar so that a proper determination could be made of whether or not Jane Doe was a "prevailing party" for purposes of attorney's fees. It was further agreed by the parties that, without a determination of the validity of the District Court's decision, it would be illogical and unfair for one litigant to subject another to an assessment of attorney's fees as a result of a wrongly decided preliminary order.

The Court of Appeals vacated the preliminary injunction and held that the case was moot because John Doe had graduated from high school. The court refused to determine the issues raised by the mooted suit and instead held that, because she had obtained beneficial injunctive relief in the District Court, Jane Doe was a prevailing party for purposes of 42 U.S.C. §1988 and entitled to "appropriate attorney's fees."[1] The UIL then petitioned this Court for writ of certiorari. The Court denied the petition, with dissent, in May, 1981. Hearing was then held before the District Court for a determination of appropriate attorney's fees. The District Court awarded attorney's fees in the amount of $8,625.00. Appeal of the award was made to the Court of Appeals which subsequently held that circumstances were not present in the case which would inhibit the court from applying the "law-of-the-case" principle enunciated in *Morrow v. Dillard,* 580 F.2d 1284 (5th Cir. 1978).

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1. The Court of Appeals' earlier decision in this case was reported as *Doe v. Marshall,* 622 F.2d 118 (5th Cir. 1980), *cert. denied,* 451 U.S. 993 (1981).

REASON FOR GRANTING THE WRIT

From its inception this case has raised serious jurisdictional issues under Section 504 and 42 U.S.C. §1983. Specifically, the district court did not decide whether the UIL was a "recipient" of federal financial assistance so as to trigger the regulatory provisions of Section 504 or whether any discriminatory treatment was administered to John Doe in the UIL's consideration of his case. Certainly these threshold questions should have been resolved by the courts before it was determined that Jane Doe was, in fact and law, a "prevailing party" for the purposes of attorney's fees. Instead, the mere entry of preliminary injunctive relief for Jane Doe—whether it was legally permissible or not—has now allowed her to recover $8,625.00 in attorney's fees.

The question of whether such action should allow an award of attorney's fees to stand against individuals who are officials of the State of Texas is of sufficient importance to merit resolution by this Court.

1. The Court of Appeal's decision is in conflict with the Court's decision in *Hanrahan v. Hampton*, 466 U.S. 754 (1980); *Doe v. Busbee*, 684 F.2d 1375 (5th Cir. 1982); and *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980).

This Court has stated that Congress has authorized an attorney's fee award "to a party who has established his *entitlement* to some relief on the merits of his claim." *Hanrahan v. Hampton, supra* at 757. (emphasis added). In other words, a party prevails in a lawsuit when he establishes a legal entitlement to what he seeks, not when what he seeks is actually delivered. *Cf. Knighton v. Watkins*, 616 F.2d 795, 799 (5th Cir. 1980).

The central question in this case has always been whether or not Jane Doe was legally entitled to bring her cause of action against the UIL. While it is true that Doe sought to have her son play football at the school of his choice and subsequently received injunctive relief which allowed him to play, the relief she obtained was only preliminary and should not have been considered a win on the merits. See *Hanrahan, supra; Smith v. University of North Carolina, supra; Oshiver v. Philadelphia Court of Common Pleas,* 497 F.Supp. 416 (E.D. Pa. 1980). The preliminary relief granted in the case at bar, although substantive, never determined the actual merits of Jane Doe's claims. No finding was made that John Doe was discriminated against by the UIL, or that he was treated differently from any student falling under the provisions of the UIL's rules. The record itself shows conclusively that John Doe was *not* treated any differently under the UIL rule because of his handicap; instead, the suit sought special treatment for him—exclusion from the provisions of a rule which, heretofore, had been applied equally to every student regardless of their personal circumstances. See *Fortson v. Dorsey,* 379 U.S. 433 (1965).

More importantly, the record shows that the District Court failed to make a crucial jurisdictional finding under Section 504 prior to entering injunctive relief for Jane Doe: the court failed to find that the UIL was a recipient of federal financial assistance.

In order for Jane Doe to have established any right under Section 504 (and, therefore, under Section 1983), she had to show that the UIL conducted a "program or activity receiving federal financial assistance," 29 U.S.C. §794 (Section 504 herein), or that the UIL was a public entity"... to which federal financial assistance (is) extended directly or through another recipient; including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance." 45 C.F.R. §84.3(f). As earlier noted, the

District Court made no finding as to federal financial assistance which would support the application of Section 504.

In construing Section 901(a) of Title IX of the Education Amendment of 1972, a statute similar to Section 504, this Court has held that to trigger statutory coverage, the threshold question of whether the *program* in question receives federal financial assistance must first be answered. *North Haven Board of Education, et al v. Terrel H. Bell, Secretary, Department of Education, et al,* _____U.S._____ 102 S.Ct. 1912 (1982). *See also Board of Public Instruction of Taylor County, Fla. v. Finch,* 414 F.2d 1068 (5th Cir. 1969). The Court's decision in *North Haven Board of Education* underscores the UIL's position that the District Court did not have jurisdiction under Section 504 to enter the preliminary injunction.

The Court of Appeals concluded, however, that because the case was "moot" on appeal, the court was precluded from determining whether the District Court was in error when it entered preliminary injunctive relief for Jane Doe. The sole fact that John Doe was allowed to play football under an erroneously entered injunction—an injunction which was awarded pursuant to a mistake of law—is not legally sufficient justification to allow an attorney's fee award to stand. *Doe v. Busbee, Supra.* See *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,* 558 F.2d 861 (8th Cir. 1977); *Hedberg v. State Farm Mutual Automobile Insurance Co.,* 350 F.2d 924 (8th Cir. 1965).

A prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1967). The circumstances presented by the case at bar—unresolved jurisdictional questions coupled with the fact that no significant issue raised by Jane Doe has ever been resolved in her

favor—clearly demonstrate that this Court should examine the Court of Appeals' decision and determine whether attorney's fees were properly entered in the case pursuant to 42 U.S.C. §1988 and the "prevailing party" standard.

2. The award of attorney's fees violates due process and "Our Federalism."

The courts' award of attorney's fees against the named defendants, without an examination of their arguments regarding the District Court's (lack of) jurisdiction, violates the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[2] Without regard to the question of whether the UIL is a person, "Our Federalism", together with the Fifth Amendment's guarantee of fundamental fairness, constitutionally prohibits the federal government, by enacting 42 U.S.C. §1988 and by judicial interpretation, from exacting money from the states and their agencies without a showing of culpability. *Younger v. Harris,* 401 U.S. 37 (1971). Congress simply cannot impose sanctions over state defendants and permit a monetary recovery, awarded by either a whim or mistake of the federal judiciary, unless those defendants are first given the chance to expose the error of a court's action. Imposing substantial liabilities on a state or its agents without requiring a finding of fault offends the doctrine of "Our Federalism."[3]

2. Whether the UIL is a "person" within the parameters of the Fourteenth Amendment has never been resolved. See *Monell v. Soc. Serv. of New York,* 436 U.S. 658 (1978). However, it should be noted that there are nine defendants in the case at bar who have been sued in their "individual" capacities. Clearly the rights of these persons are protected by the Fourteenth Amendment. Attorney's fees should not issue against them in the absence of bad faith. *Williams v. Alioto,* 625 F.2d 845, 848 (9th Cir. 1980) (per curiam), *cert. denied,* 450 U.S. 1012 (1981).

3. As U.S.C. §1988 has been construed by the Court of Appeals, the statute is "appropriate" legislation for triggering the guarantees of the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Laura S. Martin, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent by depositing same in the United States mail, certified, return receipt requested to the following attorney of record for Appellee-Respondent: Mr. Matthew Horowitz, University of Connecticut School of Law, Civil Clinic, 1800 Asylum Avenue, West Hartford, Ct 06117, on this the _____ day of April, 1983.

LAURA S. MARTIN
Assistant Attorney General

APPENDIX

APPENDIX

1. Opinion of the Court of Appeals

2. District Court Order

3. District Court Judgment

4. Fifth Circuit Judgment

5. Opinion of the Court of Appeals (Earlier)

6. Fifth Circuit Judgment (Earlier)

7. District Court Order (Earlier) ["Reasons for Granting of Preliminary Injunction"]

JANE DOE, on behalf of John Doe, a minor,
Plaintiffs-Appellees,

v.

BAILEY MARSHALL, Director of the University Interscholastic League, et al, *Defendants-Appellants.*

No. 82-2107
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Jan. 6, 1983.

Following remand, 622 F.2d 118, of appeal from judgment entered by the United States District Court for the Southern District of Texas, Cowan, J., 459 F.Supp. 1190, in civil rights action, the District Court, Hugh Gibson, J., entered award of attorney fees, and appeal was again taken. The Court of Appeals, Tate, Circuit Judge, held that prior appellate decision that attorney fees could be awarded in civil rights case absent determination of merits of plaintiff's underlying cause of action where plaintiff, who obtained requested preliminary relief, was found to be prevailing party was controlling "law of case" upon appeal from attorney fee award made on remand, and the Court of Appeals was not required, on the prior appeal, to have vacated District Court judgment and remanded with directions to dismiss, even though injunctive relief sought was found to have become moot.

Affirmed.

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Prior appellate decision that attorney fees could be awarded in civil rights case absent determination of

merits of plaintiff's underlying cause of action where plaintiff, who obtained requested preliminary relief, was found to be prevailing party was controlling "law of case" upon appeal from attorney fee award made on remand, and the Court of Appeals was not required, on the prior appeal, to have vacated district court judgment and remanded with directions to dismiss, even though injunctive relief sought was found to have become moot.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

This is an appeal from an award of attorney's fees. 42 U.S.C. § 1988. Finding that the issue presently raised was determined adversely to the defendants-appellants on a prior appeal, we affirm on the "law of the case" principle.

On a prior appeal, we found that subsequent events had mooted the preliminary injunctive relief initially afforded the plaintiff, and—over objection of the defendants that the merits should be determined—vacated the preliminary injunction as moot and remanded the case to the district court "for a determination of appropriate attorney's fees." *Doe v. Marshall,* 622 F.2d 118, 120 (5th Cir.1980), *cert. denied, sub. nom. Marshall v. Doe,* 451 U.S. 993, 101 S.Ct. 2336, 68 L.Ed.2d 855 (1981). In so remanding, this court specifically found that the plaintiff was a prevailing party by virtue of the preliminary relief obtained. Id., 622 F.2d at 120.

By this second appeal, the defendants question the award of attorney's fees by the district court on remand. No issue is raised as to the amount; the sole

issue asserted is that the district court abused its discretion in making any award at all under the special circumstances presented by this case. The special circumstance relied upon is that, allegedly, neither the trial nor appellate court had ever determined, prior to the remand hearing, that the plaintiff would prevail on the merits of her claim.[1] The defendants argue that this determination is a prerequisite to holding her to be a prevailing party. The defendants especially point out

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1. The basic suit is by the parent of a psychiatrically-handicapped child against the denial of her boy's right to participate in his high school football program. The cause of action is grounded upon Section 504, Rehabilitation Act of 1973, 29 U.S.C. § 794, which forbids denial of participation to handicapped children, by reason of their handicap, in any program receiving federal financial assistance. The defendants are the officers of an inter-high school league (which enforced a rule making the boy ineligible to play football), as well as the local school superintendent. The district court granted a preliminary injunction, specifically rejecting the defendants' contentions (a) that no private cause of action was created by section 794 and (b) that further exhaustion of administrative remedies were required; the court also rejected, but by implication only, a third contention: (c) that the League was not the "recipient" of federal funds, because the dues for its support were paid by member high schools (from funds that included commingled federal funds). (The evidence also shows that the high school football program itself, participation in which was denied the handicapped boy, was in part directly supported by federal funds.) Conceding the undisputed facts as to funding, the defendants urged (a), (b), and (c) on the first appeal. Our decision on first appeal, while determining the (a) issue adversely in order to ascertain federal jurisdiction, 622 F.2d at 118 n. 1, did not determine the other issues, in holding the injunctive relief now moot because the boy had now graduated from high school and had played football (as sought by the suit) throughout his senior year.

that the courts have never definitively passed upon one disputed essential of the plaintiff's cause of action.[2]

On the first appeal to this court, in rejecting the defendants' contention as to non-mootness, we specifically rejected the defendants' present contention that no attorney's fees could be awarded in this civil rights case absent a determination of the merits of the plaintiff's underlying cause of action. We held that under the Attorneys' Fees Act, 42 U.S.C. § 1988, it was necessary to determine only whether the plaintiff was a "prevailing party". 622 F.2d at 199-20 n. 4. Finding that the plaintiff was a prevailing party because she obtained the primary relief sought, we remanded to the district court for a determination of the appropriate attorneys' fees. 622 F.2d at 120.[3]

Under the "law of the case" principle, the issue now raised on this second appeal, having been determined adversely to the defendants on the first appeal, may not be re-litigated on this second appeal but instead will be decided in accordance with the ruling enunciated on that prior appeal. As stated by us in *Morrow v. Dillard*, 580 F.2d 1284, 1289-90 (5th Cir.1978):

---

2. The defendants point out (*see* (c) note 1*supra*) that the issue had never been explicitly determined whether enforcement of a rule by a League (only indirectly financed from federal funds), by a high school athletic program (which was in part federally financed), constituted the League a "recipient" of federal funds under section 794, so as thus to bring it within the statutory rule preventing them from denying participation in an athletic program.

3. The holding is in accord with later decisions of this circuit, such as *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir.1982) and *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338-39 (5th Cir.1981) (explaining the application of a United States Supreme Court decision that defendants rely upon to contrary effect, as permitting the award of attorneys' fees to a prevailing party who obtains preliminary injunctive relief only).

> The doctrine of "law of the case" is a rule of practice under which a rule of law enunciated by a federal court "not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but [also] establishes the law which other courts owing obedience to it *must*, and which it itself will, normally, apply to the same issues in subsequent proceedings in the same case." 1B Moore's Federal Practice ¶ 0.404[1] (2d ed. 1974)(footnotes omitted, emphasis in original). The doctrine is "based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94 L.Ed. 750 (1950); *Fontainebleau Hotel Corp. v. Crossman*, 286 F.2d 926, 928 (5th Cir.1961).[4]

The defendants inferentially recognize that they can obtain no relief on the present appeal unless our prior appellate ruling is ignored or set aside.

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4. *Morrow v. Dillard* (quoting the 1967 Fifth Circuit decision, *White v. Murtha*, 377 F.2d 428, 431-32) also notes, 580 F.2d at 1290:

> While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a latter appeal in the appellate court, *unless* [1] the evidence on a subsequent trial was substantially different, [2] controlling authority has since made a contrary decision of the law applicable to such issues, or [3] the decision was clearly erroneous and would work manifest injustice.

None of these exceptions are shown to be applicable here.

On this second appeal, they now contend that, upon finding the prior appeal to be moot, the deciding panel in the earlier appeal should have followed the general rule applicable when an appeal is mooted: to vacate the district court judgment and to remand with directions to dismiss the case, so as to prevent preclusive effect of the first appellate opinion. *United States v. Munsingwear, Inc.* 340 U.S. 36, 39-40, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950). *See, e.g., University of Texas Systems v. Assaf,* 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978). The defendants suggest that, due to the prior panel's failure to follow this general rule, the preclusive danger inherent in failing to vacate the judgment has come to pass in this case. Accordingly, they call upon this panel in this second appeal to set aside the decree in the first appeal and to order dismissal of the case on the merits, as allegedly should have been ordered on the initial appeal.[5]

In making this contention that the prior appellate decision in this case was in error, the defendants essentially reurge contentions rejected by this court on the earlier appeal. As previously noted, in absence of exceptional circumstances not here shown to be present, the law-of-the-case principle inhibits us from resurrecting and giving favorable consideratin to contentions previously rejected by this court on the earlier appeal.

Accordingly, we AFFIRM the judgment below that awarded the plaintiff, as the prevailing party, attorneys' fees under 42 U.S.C. § 1988.

AFFIRMED.

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5. The defendants call on this panel upon this second appeal, "to review its [this Court's] earlier decision in this case" and to "remand the case back to the district court with an order to dismiss the case" so as to conform with the general mootness rule in *Munsingwear-Assaf.* Appellants' Reply Brief, pp. 7-9.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, on behalf of John Doe, *Plaintiff*	§	
	§	CIVIL ACTION
v.	§	No. G-78-174
BAILEY MARSHAL, etc., et al, *Defendants*	§	

ORDER

Plaintiff brought this action for injunctive relief on behalf of her minor son, alleging that defendants had violated his rights under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. This Court's predecessor, the Honorable Finis E. Cowan, granted a preliminary injunction and the defendants appealed. During the pendency of this appeal, the plaintiff's request for injunctive relief became moot. Accordingly, the Fifth Circuit declined to hear the merits of the case. The Court of Appeals determined, however, that plaintiff was the prevailing party under the attorneys fees provision of the Civil Rights Act of 1964, 42 U.S.C. §1988, and remanded the case to this Court for a determination of appropriate attorneys fees. Defendants have repeatedly diverted this Court's attention from the narrow inquiry into attorneys fees with arguments that the Court should ignore the clear mandate of the Fifth Circuit and proceed to relitigate the merits of the case. Defendants' arguments strike no responsive chord; this Court sits to enforce the mandates of the Fifth Circuit, not to question them.

In awarding attorneys fees, the Court is guided by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In *Johnson*, the Fifth Circuit set

forth twelve factors to be considered by the district court in arriving at an award of attorneys fees. *Id.* at 717-19. No one factor is controlling and all should be considered to the extent that they are relevant to the case.

Plaintiff's counsel seeks an award of attorneys fees at an hourly rate of $75 on a claim of 178.5 hours. Counsel expended 20 hours in the commencement of the action and the securing of preliminary injunctive relief for his client. Thirty hours of legal time are claimed in connection with research, preparation of memoranda, motions and affidavits in connection with an award of attorneys fees. A vast majority of the hours claimed, 128.5 hours, was consumed in the appellate process. A total of 114 hours involved defendants' appeal to the Fifth Circuit, and 14.5 hours were related to defendants' unsuccessful petitioning of the Supreme Court for a writ of certiorari.

In assessing counsel's hourly claim, the Court must weight the claim against its own knowledge, experience and expertise of the time required to complete similar activities. *Johnson v. Georgia Highway Express, supra,* at 717. In considering the hourly claim, the Court must, of course, take into account the novelty and difficulty of the questions involved in the case, and the skill requisite to the proper performance of legal services. At the commencement of this action, the case was for all practical purposes one of first impression with respect to several significant legal issues. A threshhold inquiry of overriding significance was whether section 504 of the Rehabilitation Act secured the plaintiff a private right of action. Beyond this, the question of what constituted discrimination under section 504 was and continues to be, a matter of some dispute. The factual questions in this case, however, were neither difficult nor novel; nor was the standard required for obtaining preliminary injunctive relief.

Counsel for a prevailing civil rights litigant is entitled to compensation for all time reasonably expended in advancing his client's interest. *Knighton v. Watkins,* 616 F.2d 795, 801 (5th Cir. 1980). Without a doubt, counsel is entitled to compensation for the 20 hours expended in securing preliminary injunctive relief for his client. The Court finds, however, that the expenditure of 114 hours in connection with defendants' appeal to the Fifth Circuit was excessive. When appeal was taken, the case remained essentially one of first impression involving several significant and complex legal issues. An appellate decision on the merits of these issues would have been of considerable precedential value. The record reflects that counsel expended 72 hours in research and drafting of plaintiff's appellate brief. There is no question as to the excellence of counsel's work product, his preparation, and the general ability displayed before this Court and the Court of Appeals. Nevertheless, counsel had initially explored and developed the legal issues at the lower court level, and the expenditure of such vast amounts of time in connection with the presentation of legal issues on appeal was not reasonably necessary.

The case became moot while on appeal. Through a combination of the preliminary relief granted and the passage of time, plaintiff ultimately obtained all relief sought. Even had the Fifth Circuit considered the case on the merits and reversed, plaintiff would still have obtained all the relief sought.

The Fifth Circuit's decision thus addressed only one aspect of the case: whether the plaintiff was a "prevailing party" so as to permit an award of reasonably necessary attorneys fees. Counsel seeks compensation for 32 hours expended in researching and drafting a supplemental brief on the mootness and attorneys fees issues, in oral arguments before the Court of Appeals, and in supplemental letter briefs requested by the Fifth Circuit. The Court is of the opinion that counsel spent

more time than is reasonably necessary in connection with these efforts. First, it is unclear to the Court why counsel required 12 hours for the research and preparation of a five-page supplemental appellate brief in view of his previous expenditure of 18 hours in the researching and drafting of a memorandum on attorneys fees filed in this Court. Second, although counsel expended 10.5 hours in the research and drafting of two letters requested by the Fifth Circuit in light of its intervening decision in *Camenisch v. University of Texas,* 616 F.2d 127 (5th Cir. 1980), some of this effort involved a reiteration of matters discussed in plaintiff's supplemental brief.

In sum, the Court finds that counsel is not entitled to compensation for all the time claimed in advancing his client's interests before the Fifth Circuit. An award taking into consideration an expenditure of 60 hours before the appellate court will reasonably compensate counsel for his legal representation. The Court, however, will award counsel compensation for all hours claimed in connection with defendants' unsuccessful petition to the Supreme Court for a writ of certiorari.

It is clear that it is defendants who, for the most part, have made the issue of attorneys fees a battleground in this case. Obviously, plaintiff's counsel is entitled to compensation for all time reasonably expended in connection with this issue. *Johnson v. Mississippi,* 606 F.2d 635 (5th Cir. 1979). Counsel claims 30 hours in connection with the presentation of the attorneys fees issue before this Court. Even taking into account that the amount of time expended by counsel was dictated principally by defendants' strident opposition to the propriety of the award, the Court finds an expenditure in excess of 20 hours was not reasonably necessary. Therefore, the Court will award attorneys fees in consideration of the expenditure of 115 hours, which the Court finds was reasonably necessary in the advancement of plaintiff's interests.

Counsel seeks compensation at a rate of $75 per hour. There is substantial evidence in the record that $75 per hour is the customary fee for similar work in this community. Plaintiff's counsel, however, misreads *Johnson* in arguing that the fee rate in civil rights cases should be *predicated* upon the customary fee in the community. Clearly, it is an important, but not controlling, consideration. *Johnson v. Georgia Highway Express, supra*, at 718. While the Court finds an hourly award of $75 to be appropriate under the circumstances in this case, it has not done so without consideration of the manifold factors set forth in *Johnson*. As a general rule, more experienced attorneys should receive greater compensation. However, the young attorney who demonstrates requisite skill and ability, particularly one who specializes in the area of civil rights, should not be penalized for only recently being admitted to the bar. In this case, plaintiff received competent, workmanlike, and effective assistance of counsel. As a direct result of counsel's efforts, plaintiff received all relief to which she alleged entitlement. The fact that plaintiff's counsel had been practicing law for only two years at the time this action was commenced is of no moment in view of the skill and diligence with which counsel prosecuted plaintiff's law suit. *See Id.* at 718-19. Moreover, counsel, as an employee of the American Civil Liberties Union, agreed to take the case without a fixed or contingent fee, and has looked only to the statutory provisions as a basis for an award. An hourly award of $75 is consonant with awards in similar cases.

Other considerations listed in *Johnson* have little or no bearing upon the present case. While lengthy appellate review may well have precluded other employment opportunities for plaintiff's counsel, the record does not so reflect. And while this case, like many other civil rights cases, might be considered "undesirable" because of potential economic impacts on an attorney's practice, it is widely acknowledged that "undesirable" cases are the ACLU's forte. Certainly, there is no

evidence that counsel's representation of plaintiff in this civil rights action had or will have any economic impact on his practice.

The statutory provision authorizing the award of attorneys fees in cases such as this was not enacted for the benefit of lawyers, but rather to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to place the economical burden of civil right litigation fairly. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession. In this case, the Court is of the opinion that an award of $8,625.00 will adequately and effectively serve the purposes for which the statute was enacted. Therefore it is

ORDERED, ADJUDGED, and DECREED that plaintiff is awarded attorneys fees in the amount of $8,625.00 in accordance with the mandate of the Fifth Circuit Court of Appeals.

DONE this the 11th day of February, 1982, at Galveston, Texas.

/s/

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, on behalf of John Doe, *Plaintiff*	§	
	§	CIVIL ACTION
v.	§	No. G-78-174
BAILEY MARSHAL, etc., et al, *Defendants*	§	

FINAL JUDGMENT

This case having been remanded from the Fifth Circuit for an award of attorneys fees and being in all other respects moot, now be it

ORDERED, ADJUDGED and DECREED that plaintiff is awarded attorneys fees in the amount of EIGHT THOUSAND SIX HUNDRED TWENTY-FIVE DOLLARS ($8,625.00); and further

ORDERED that the case be, and the same hereby is DISMISSED.

Taxable costs of court, if any, are assessed against the defendants.

This is a final judgment.

DONE this the 11th day of February, 1982, at Galveston, Texas.

/s/

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Summary Calendar

D.C. Docket No. CA-G-78-174

JANE DOE, on behalf of John Doe, a minor,
Plaintiff-Appellee,

versus

BAILEY MARSHALL, Director of the University Interscholastic League, and Member of the Executive Committee, Individually and in his Official Capacity, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before GEE, RANDALL and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

January 6, 1983

Issued as Mandate: 1-28-83

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,
Plaintiff-Appellee,

V.

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,
Defendants-Appellants

No. 78-3065.

United States Court of Appeals, Fifth Circuit.

July 21, 1980.

Action was brought on behalf of emotionally handicapped minor for injunctive relief which would allow minor to play interscholastic high school football at school to which he had transferred for medical reasons, despite interscholastic league's transfer regulations. The United States District Court for the Southern District of Texas, Finis E. Cowan, District Judge, granted a temporary injunction allowing minor to play football, and Defendant appealed. The Court of Appeals, Godbold, Circuit judge, held that: (1) the case was rendered moot by graduation of the minor, who had continued to play football throughout his senior year, and (2) even though the case was rendered moot, Plaintiff was entitled to an award of attorney fees.

Vacated and remanded.

1. FEDERAL COURTS 757

Action brought on behalf of emotionally handicapped minor for injunctive relief which would allow minor to play interscholastic high school football at school to which he transferred for medical reasons, despite interscholastic league's transfer regulations, was moot where minor, who had continued to play football throughout his senior year in high school during pendency of the appeal, had graduated, and the case was not salvaged either by fact that Plaintiffs were required to post a $15 injunction bond or by their request for attorneys fees. Rehabilitation Act of 1973, §504, 29 U.S.C.A. §794.

2. CIVIL RIGHTS 13.17

A determination of mootness on appeal neither precludes nor is precluded by an award of attorney fees; question of attorney fees turns instead on wholly independent consideration of whether Plaintiff is a "prevailing party". 42 U.S.C.A. §1988.

3. FEDERAL CIVIL PROCEDURE 2737

Even preliminary relief may serve to make a Plaintiff a "prevailing party" such as would entitle him to award of attorney fees. 42 U.S.C.A. §1988.

4. FEDERAL CIVIL PROCEDURE 2737.5

Plaintiff, who obtained a temporary injunction allowing her emotionally handicapped minor son to play interscholastic high school football despite interscholastic league's transfer regulations was entitled to attorney fees even though the case was rendered moot during appeal by minor's graduation.

Appeal from the United States District Court for the Southern District of Texas.

Before GODBOLD, TJOFLAT and SAM D. JOHNSON, Circuit Judges.

GOLDBOLD, Circuit Judge:

Appellee brought this action for injunctive relief on behalf of her minor son, John Doe, alleging that Appellants had infringed his rights under §504 of the Rehabilitation Act of 1973, 23 U.S.C. §794.[1] The minor, who had remained anonymous throughout these proceedings, is an emotionally handicapped individual who transferred from one school district to another for medical reasons. Appellant University Interscholastic League (UIL) interpreted its own transfer regulations to preclude John from playing football at his new school. The district court found that all four factors necessary for preliminary relief were present,[2] and granted a temporary injunction allowing John to play football. The UIL appeals.

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1. Section 504 creates a private right of action in addition to the administrative remedies it provides. *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980). We are thus not faced with a case in which no federal jurisdiction exists because the sole issue presented is interference with the right to play football. See *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970). Instead, the refusal to allow John to play football infringes on statutorily-created federal right and thus the claim asserts a federal cause of action. See *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 156 (5th Cir. 1980).

2. Those factors are:

> 1. Irreparable harm to the Plaintiff from failure to issue the injunction.
>
> 2. The relative lack of harm to the Defendant from issuance of the injunction.
>
> 3. The public interest.
>
> 4. Probability that the Plaintiff will ultimately succeed on the merits. *Camenisch v. University of Texas*, 615 F.2d 127, 130 (5th Cir. 1980).

[1] During the pendency of this appeal, John has graduated from high school, having continued to play football throughout his senior year. This suit was not brought as a class action, and appellant sought only injunctive relief and not damages. There is, therefore, no longer a justiciable case or controversy and the case is moot.

Appellants contend that this case is "capable of repetition, yet evading review," and thus is within an established exception to the doctrine of mootness. *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147, 161 (1973); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310, 316 (1911). This argument must fail in light of *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). In this case, as in *DeFunis*, the student has completed his final term in school, and "will never again be required to run the gauntlet" of the UIL's transfer policies, *id.* at 319, 94 S.Ct. at 1707, 40 L.Ed.2d at 170. Moreover, as in *DeFunis*, there is no reason to suppose that future attacks on the UIL's rules will similarly evade review. *Id.* Finally, the case meets neither of the tests set out in *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 157 (5th Cir. 1980); the effect of the rule is not too short in duration to be fully litigated prior to its cessation or expiration, and there is no reasonable expectation that the Plaintiff will be subjected to the same difficulties again.

Appellants also contend that the fact that Appellees were required to post a $15.00 injunction bond keeps the controversy alive, citing *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980). Camenisch may be distinguished on two grounds. First, the bond in *Camenisch* could not be dissolved without an adjudication on the merits; the question presented in that case was which party ought to pay particular costs, and the bond constituted Plaintiff's guarantee of payment should the burden ultimately fall on him. In this case,

Appellants have neither advanced monies nor suffered financial harm, so there will be no ultimate liability on the bond. Second, *Camenisch* involved a $3,000 bond; the $15.00 bond posted in this case must be considered de minimus by comparison.

Appellants' final argument is that appellee's request, under 42 U.S.C. §1988, for attorneys' fees salvages an otherwise moot case.[3] This court has frequently refused to consider the merits of an otherwise moot case and has left the question of attorneys' fees for the district court on remand. See, e.g., *Johnson v. Mississippi*, 586 F.2d 387 (5th Cir. 1978); *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir.), cert. denied, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976).[4] Moreover, a determination of mootness does not prevent an award of attorneys' fees on remand. *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1140 (9th Cir. 1979); *Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118, 120 (5th Cir. 1979); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974), cert. denied, 422 U.S. 1048, 95 S.Ct. 2666, 45 L.Ed.2d 700 (1975).

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3. Appellee also urges this contention, apparently fearful that a determination of mootness by this court would preclude any award of attorneys' fees. Our discussion of attorneys' fees rejects both arguments.

4. In *Rainey v. Jackson State College*, 481 F.2d 347 (5th Cir. 1973), the court proceeded to the merits of a moot case in order to resolve a claim for attorneys' fees. *Rainey* is inapposite. In that case, the district court reached a final deremination on the merits after a prelimiry injunction had mooted the case. The case was thus already moot when it was tried in the district court. The Attorneys' Fees Act, 42 U.S.C. §1988, had not been enacted when Rainey was decided and the standard for awarding attorneys' fees was whether Defendant had been "unreasonable and obdurately obstinate". *Id.* at 350. This standard required examining the merits. As discussed below, §1988 requires only that Plaintiff be a "prevailing party".

[2-4] Thus a determination of mootness neither precludes nor is precluded by an award of attorneys' fees. The attorneys' fees question turns instead on a wholly independent consideration: whether Plaintiff is a "prevailing party." *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir. 1979); *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284 (5th Cir. 1978). Even preliminary relief may serve to make a Plaintiff a "prevailing party" under the statute; the lawsuit need not proceed to completion. *Bly v. McLeod*, 605 F.2d 134 (4th Cir. 1979); *Iranian Students Association, supra; Criterion Club, supra; International Society for Krishna Consciousness, Inc. v. Andersen*, 569 F.2d 1027 (8th Cir. 1978); *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977). All that is required is that the Plaintiff obtain the primary relief sought. *Iranian Students Association, supra*, 604 F.2d at 353; *Adams v. Reed*, 567 F.2d 1283, 1288 (5th Cir. 1978). That requirement has been satisfied in this case.

We therefore vacate the preliminary injunction as moot, and remand the case to the district court for a determination of appropriate attorneys' fees.

VACATED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 78-3065

D.C. Docket No. CA-G-78-174

JANE DOE, on behalf of John Doe, a minor,
Plaintiff-Appellee,

versus

BAILEY MARSHALL, Director of the University Interscholastic League, and Member of the Executive Committee, Individually and in his Official Capacity, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before GODBOLD, TJOFLAT and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated, and that this cause be, and the same is hereby remanded to the said District Court for a

determination of appropriate attorneys' fees in accordance with the opinion of this Court;

It is further ordered that each party pay its own costs on appeal.

July 21, 1980

Issued as Mandate: 10-8-80

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, on behalf of JOHN DOE, a minor, *Plaintiff*	§	
V.	§	CIVIL ACTION NO. G-78-174
BAILEY MARSHALL, Director of the University Interscholastic League, Et Al., *Defendants*	§	

Matthew Horowitz, Houston, Texas
For Plaintiff

Robert W. Gauss, Assistant Attorney General,
Austin, Texas
For Defendant UIL

REASONS FOR GRANTING OF PRELIMINARY INJUNCTION

For the reasons stated herein, the Court has concluded that the Plaintiff is entitled to a preliminary injunction restraining the Defendants from barring Plaintiff from interscholastic competition and restraining the Defendant McKenzie from denying to the Plaintiff the right to participate in interscholastic athletics, particularly football, during the school year 1978-79. The reasons for the granting of this relief are set forth herein.

ESSENTIAL FACTS

The parties have appeared, introduced evidence, and on the basis of this evidence the Court finds that the

facts set forth in the Plaintiff's Original Complaint, a copy of which is appended hereto as Exhibit A, are essentially correct, at least for purposes of determining the Plaintiff's right to a preliminary injunction.

The essential facts are:

1. John Doe is a "handicapped" individual within the meaning of 29 U.S.C. §794.

2. John Doe, because of an unusual set of circumstances, has a legitimate, compelling necessity for living with his grandparents rather than his parents.

3. John Doe, because of his severe psychiatric difficulties, has a genuine, compelling need to participate in interscholastic football, and denying him this right, under the circumstances, would create irreparable harm. Participation in athletics during his senior year could mean the difference between John Doe's growing up as a normal, productive adult, as distinguished from the possibility of his being institutionalized for the rest of his life.

Plaintiff has exhausted her apparent administrative remedies with the Alvin Independent School District (hereinafter AISD) and with the University Interscholastic League (hereinafter UIL), seeking relief from AISD, from the UIL, and from the District Executive Committee of the UIL which preliminarily determines eligibility.

Plaintiff seeks relief under 42 U.S.C. §1983 and 29 U.S.C. §794. 42 U.S.C. §1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be sub-

> jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

29 U.S.C. §794 reads:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

A review of the legislative history and the cases which illuminate §794 reveal that this congressional enactment, for practical purposes, places upon school districts and agencies which receive federal funds, such as the Defendants, the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education. The failure to perform this analysis and structure a program suited to the needs of each handicapped child, constitutes discrimination against that child and a failure to provide an appropriate, free public education for the handicapped child. *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 30 L.Ed.2d (1973); *Crawford v. University of North Carolina,* 440 F.Supp. 1047 (ND NC 1977); *Hairston v. Drosick,* 423 F.Supp. 180 (SC W. Va. 1976); *Camenisch v. University of Texas,* _____F.Supp._____(WD Tx 1978); *Fialkowski v. Shapp,* 405 F.Supp. 946 (ED Pa 1975).

In this particular case, AISD is willing to perform its legal duty. AISD has, however, in effect, delegated to the UIL the right to determine which students will participate in interscholastic athletics.

The challenged rule of the UIL would, as construed by UIL, prohibit John Doe's playing football for AISD. There is apparently no structure within the organizational scheme of the UIL which provides a mechanism by which special and individual cases, such as John Doe's, may be given special and individual handling.

A review of the facts and the authorities set forth above has persuaded this Court that there is a reasonable probability that the Plaintiff will prevail on the merits.

The Court, in determining whether or not to grant a preliminary injunction, must also balance the harm which will be inflicted upon the Plaintiff, if relief is not granted, against the harm which will be visited upon the Defendants in the event relief is granted. In this case, as in the recent case of *Kite v. University Interscholastic League,* _____F.Supp._____(SD Tx 1978), the balancing task is easy. The harm which would be inflicted upon this young man were he denied the opportunity to play football in his senior year at Alvin may be enormous. Playing football in his senior year may make the difference between this young man's growing up into a productive, happy individual, or, on the contrary, being institutionalized for the balance of his life. Denying this young man and his parents the right to the individualized treatment which 20 U.S.C. §794 mandates, is a severe deprivation.

No harm is visited on the UIL, in this court's view, by the preliminary injunction. The UIL rule in question was designed to prevent recruiting abuses and to prevent an athlete from irresponsibly "shopping around"

for a school or a coach. There is no suggestion or hint in the evidence that either of these evils is in any degree involved here, and the Plaintiff has proved persuasively that there are compelling medical and psychiatric reasons why this young man needs to go to school in Alvin, and needs to play football on the Alvin team.

The Court needs to balance the questions involved here in the light of the public interest. This Court believes that 29 U.S.C. §794 is a humane, and reasoned statute and that the public interest is served by its enforcement. In any event, regardless of this Court's veiws concerning 29 U.S.C. §794, it is the law as enacted by the Congress of the United States, and it is this Court's duty under 42 U.S.C. §1983 to enforce it.

Defendants contend that 29 U.S.C. §794 does not provide a private right of action. The law is to the contrary. See *Lau v. Nichols, supra; Cort v. Ash,* 442 U.S. 66, 45 L.Ed.2d 26 (1975); *Lloyd v. Regional Transportation,* 548 F.2d 1277 (7th Cir. 1977); *United Hanidcapped Federation v. Andre,* 558 F.2d 413 (8th Cir. 1977); *Kampmeier v. Nyquist,* 553 F.2d 296 (2nd Cir. 1977).

For the reasons set forth above, this Court has determined to grant a preliminary injunction enjoining the Defendants from taking any action to prevent John Doe from playing football for Alvin Independent School District, during the football season commencing in August of 1978. This case is not a class action. The relief granted is granted only to John Doe and his parents, and is granted only pending the trial of this case on the merits.

DONE this the 16th day of August, 1978.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, on behalf of	§	
JOHN DOE, a minor,	§	
Plaintiff	§	
V.	§	Civil Action
	§	No. G-78-174
BAILEY MARSHALL,	§	
Director of the University	§	
Interscholastic League,	§	
Et al.,	§	
Defendants	§	

INJUNCTION

For the reasons stated in that document of even date herewith entitled "Reasons for Granting of Preliminary Injunction," the court hereby GRANTS a preliminary injunction, and pending trial of this case on the merits, enjoins the Defendants from interfering with, or preventing the minor Plaintiff, JOHN DOE, from full participation in the football program at Alvin Independent School District during the school year commencing in August 1978; and enjoining the Defendants from taking any action which would prohibit, impede or interfere with the rights of Alvin Independent School District to participate fully in the activities of the University Interscholastic League because of John Doe's participation on the Alvin Independent School District team. Plaintiff shall post a bond in the amount of Fifteen Dollars ($15.00).

The papers in this case which were previously sealed are now ordered unsealed since this matter has now been heard fully in open court.

DONE this the 16th day of August, 1978.

United States District Judge